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No. 569

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Supreme Court of the United States

CIVIL ACTION.

VINCENZO IANNELLA and FRANK S. RUSSO,
Plaintiffs-Appellants,

vs.

ARVID JOHNSON, Recorder of the Township of Piscataway, and TOWNSHIP OF PISCATAWAY, a municipal corporation of New Jersey,
Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY, FORMERLY THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

On Motion to Dismiss Appeal.

BRIEF OF APPELLANTS, VINCENZO IANNELLA AND FRANK S. RUSSO.

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Statement of Questions Involved.

Is the zoning ordinance of the Township of Piscataway, in so far as it prohibits throughout the entire Township of Piscataway the lawful business of slaughtering of animals, violative of the fourteenth amendment of the Constitution of the United States in that it deprives appellants of their property without due process of law and denies to appellants the equal protection of law?

Did the judgment of the Court of Errors and Appeals of New Jersey, now the Supreme Court of New Jersey under the new Constitution of the State of New Jersey, holding that these appellants were precluded from raising the foregoing constitutional question set out above because appellants failed to certiorari or otherwise review the determination of the Board of Adjustment of August 1, 1946, constitute an adequate non-Federal ground or was such non-Federal grounds inadequate, unsubstantial and illusory in order to escape determination of the aforesaid constitutional question?

If the Board of Adjustment of the Township of Piscataway on August 1, 1946, and at all other times, were totally without jurisdiction to act in the matter before it as presented by the appellants, and its judgment was therefore a nullity, are appellants precluded from raising the foregoing constitutional question even though the Board of Adjustment was without jurisdiction and its determination a nullity?

Is R. S. 40:55-46, providing for an appeal within 30 days after filing of the decision in the office of the Board of Adjustment unconstitutional because the time period is unreasonably short?

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Statement of Facts.

Nature of Proceeding:

This matter is before the Court on the appellees' motion to dismiss appellants' appeal. The notice of the motion was served upon Edward J. Santoro, one of appellants' attorneys, on January 14, 1949. The appellees were served on December 24, 1948, with a copy of the petition of appeal, statement of jurisdiction, Notice as to Rule 12, Paragraph 3, of the Rules of this Court, Order allowing Appeal, and all the other required papers. This motion was therefore made by the appellees contrary to Rule 12, Paragraph 3, of the Rules of this Court since it was not made and served "within 15 days after service" of all the papers required to be served under Paragraph 2 of said Rule. The motion of appellees seeks to dismiss the appeal allowed in this action on the ground that the Court of Errors and Appeals of New Jersey, now the Supreme Court of New Jersey, properly escaped or omitted the determination of the conceded constitutional question on an adequate non-Federal ground. The appellants will show that the State Court did not rest its determination on an adequate non-Federal ground but the non-Federal ground used by the State Court was inadequate, unsubstantial, and illusory and used by the State Court to escape determination of the constitutional question. If consideration is to be given the motion by the Court, it can only be done after the Court considers the Statement of Jurisdiction as filed by the parties.

Chronological Statement of Facts:

References throughout are to the State of Case filed in the appeal to the Court of Errors and Appeals in New Jersey. All the pertinent facts appear in the testimony of

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the appellant, Vincenzo Iannella, before the Recorder's Court of the Township of Piscataway (S. C., pp. 16-24).

Appellants purchased on March 26, 1946, the slaughterhouse in question located on New Brunswick Avenue, Piscataway Township, New Jersey, and which site is located in an Industrial Zone under the zoning ordinance of the Township of Piscataway, from Edward Geschwind and Eugene Hoffman for $15,000.00. Appellants expended several more thousands of dollars in making improvements to the slaughterhouse. It was necessary for appellants to obtain a license from the State Board of Health, or a transfer of their vendors' license, before operating the slaughterhouse. This license was obtained in April, 1946, and the sale was then consummated.

The zoning ordinance of the Township of Piscataway, enacted on November 16, 1937, prohibited throughout the entire Township of Piscataway the business of slaughter of animals. Section 3 of the zoning ordinance divided the Township of Piscataway into five zones. The business of slaughter of animals was omitted from the permissible uses in the first four zones, and in the fifth zone, Industrial, and where appellants' slaughterhouse is located, was expressly prohibited by Section 9 thereof. See Zoning Ordinance (S. C., p. 61).

Appellants were totally ignorant of the prohibition of their business due to the zoning ordinance. Appellant's predecessors in the operation of their slaughterhouse, Geschwind and Hoffman, were authorized by the Board of Adjustment of the Township of Piscataway on February 10, 1943, to operate the slaughterhouse in question for the duration of the war (World War II) or rather for not more than 3 months after cessation of hostilities (S. C., p. 25). Needless to state the action of the Board of Adjustment in granting Geschwind and Hoffman authority to

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operate the slaughterhouse was contrary to law, *ultra vires*, and beyond the power of the Board of Adjustment. However, the action of the Board of Adjustment in granting Geschwind and Hoffman authority to operate the slaughterhouse was never legally questioned and Geschwind and Hoffman operated the slaughterhouse continuously from February 10, 1943, up to April, 1946, when appellants took over the operation of the slaughterhouse. It was the *ultra vires* act of the Board of Adjustment on February 10, 1943, which placed appellants in their present predicament. On August 14, 1945, Japan officially surrendered to the United Nations so that on November 14, 1945, the authority granted by the Board of Adjustment to operate the slaughterhouse had terminated. However, the Township authorities did nothing to terminate the operation of the slaughterhouse by Geschwind and Hoffman.

With the sale of the slaughterhouse to appellants consummated in April, 1946, and payment of the purchase price in full to Geschwind and Hoffman, so that they were out in the clear and presumably with a good profit, the Township authorities no longer acquiesced in the continued operation of the slaughterhouse contrary to the said zoning ordinance. After giving appellants a breathing spell during April, May and June, 1946, to operate the slaughterhouse, on July 1, 1946, and conspicuously in the absence of any protest by any resident or taxpayer of the Township, the Board of Adjustment directed its Secretary to write appellants a letter to appear before the Board of Adjustment on July 30, 1946, at 8 P. M., and show cause why they were operating a slaughterhouse in the Township of Piscataway contrary to the Township zoning ordinance and mentioning the provision in the ordinance imposing a penalty each day for such violations (S. C., p. 50).

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Appellants appeared before the Board of Adjustment on July 30, 1946, and told the Board of Adjustment that they were completely ignorant of the prohibition in the zoning ordinance against the slaughter of animals in the Township; that they expended $15,000 to buy the slaughterhouse; and that their investment would be lost if they could not operate the slaughterhouse. Appellants were not then represented by counsel. The Board of Adjustment sympathized with appellants and told appellants that the Board of Adjustment could do nothing for appellants unless appellants wrote a letter asking for permission to operate the slaughterhouse another year. The Secretary of the Board of Adjustment then typed a short letter asking permission from the Board of Adjustment to operate the slaughterhouse another year and appellants then signed the letter and presented it to the Board of Adjustment. The Board of Adjustment then informed appellants that they could leave the meeting and the Board would consider their letter. The Board of Adjustment on July 30, 1946, adopted a resolution granting appellants authority to operate the slaughterhouse for another year. However, the Board of Adjustment again convened on August 1, 1946, and rescinded the prior resolution, and directed its Secretary to notify appellants to terminate operation of their slaughterhouse on September 9, 1946 (S. C., pp. 50-53).

Appellants operated their slaughterhouse on September 21, 1946, and were apprehended, arrested, and summoned to appear before Recorder Arvid Johnson, of the Township of Piscataway, on October 2, 1946, for illegally operating a slaughterhouse in the Township of Piscataway, and were convicted and fined $25.00 each. The conviction in effect put appellants out of business (S. C., p. 66).

Appellants have appealed from their said convictions through all the courts of New Jersey and now appeal to

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this Court. Appellants have throughout all the State Courts argued that their convictions were in violation of the fourteenth amendment of the Constitution of the United States because the zoning ordinance, in so far as it prohibits this lawful business throughout the entire Township of Piscataway, deprives them of their property without due process of law and denied them the equal protection of law. The State Courts held that appellants were precluded from raising the constitutional question because appellants failed to appeal from the determination of the Board of Adjustment on August 1, 1946, wherein appellants were denied permission to operate the slaughterhouse for another year. Appellants will show that the determination of the Board of Adjustment on August 1, 1946, was a nullity as the Board of Adjustment was wholly without jurisdiction.

ARGUMENT.

POINT 1.

The Board of Adjustment on August 1, 1946, and at all times, was without jurisdiction to grant appellants permission to operate the slaughterhouse for another year, or for any time.

The opinion of the Court of Errors and Appeals of New Jersey in this cause is reported in 137 New Jersey Law, 659, or 61 A (2d) 237. It affirmed the judgment of the Supreme Court of New Jersey and on the opinion of the Supreme Court. The opinion of the Supreme Court in this cause is reported in 136 New Jersey Law, 514, or 56 A (2d) 894. The pertinent part of the opinion of the Supreme Court is as follows:

> "We have carefully considered the record before us, as well as the able briefs of counsel, and are of

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the opinion that prosecutors were properly denied any relief in this Court. Iannella and Russo, having been denied an extension of their permit to operate the slaughterhouse on August 1, 1946, had an appropriate legal remedy which they might have pursued, namely, by appeal from the Board of Adjustment's denial of their application for an extension of their permit within thirty days thereafter. They chose not to do so. Instead, with full knowledge of the facts, they continued, at their peril, the operation of the slaughterhouse and as a result thereof were convicted as aforesaid.

The prerogative writ of certiorari will not lie, if the prosecutor is in laches or it has not been prosecuted with due diligence. Parker *et al. v.* Borough of Point Pleasant *et al.*, 167 A. 217, 219, 11 N. J. Misc. 535, opinion by Mr. Justice Perskie. Justice Perskie therein said: "• • • While there is no hard and fixed rule that can be laid down for a guidance on the subject matter of laches, nevertheless, when one seeks to invoke the discretion of the court to grant the extraordinary writ of certiorari, he must prosecute his claim with diligence".

In Home Fuel Oil Co. *v.* Borough of Glen Rock, 118 N. J. L. 340, 192 A. 516, 519, a situation similar to that at bar prevailed. There, the prosecutor failed to avail itself of the statutory remedy within the statutory period following the adverse action of the Board of Adjustment and was subsequently convicted for violating the zoning ordinance. It then obtained a writ of certiorari to review the police court conviction. On the review it sought to question the constitutionality of the zoning ordinance and also the unreasonableness of the action of the Board of Adjustment in denying its application. Mr. Justice Perskie in affirming the judgment of conviction and dismissing the writ said:

"Notwithstanding the position taken by counsel for the defendants, namely, that the writ does bring

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up the validity of the zoning ordinance, and the further fact that the allocatur was allowed, it is nevertheless, argued for defendants that since prosecutor failed to review the action of the board of adjustment in denying its appeal, that it is now barred, in this proceeding which is to review a conviction before a recorder, from reviewing the facts and circumstances upon which the board of adjustment based its judgment. We think the point is well taken.

"• • • Prosecutor, as already observed, properly followed that procedure to the point of an adverse determination by the board of adjustment of its appeal. It then permitted that determination to stand unchallenged. It did not exhaust the statutory provision of appeal. Prosecutor should not under these circumstances be permitted to resurrect the issues and determinations of the board of adjustment in this cause when its right to do so, in direct attack, under the statute, has long since expired.

"We are, therefore, of the opinion that the prosecutor should not be permitted to collaterally review the action of the board of adjustment in this cause. To hold otherwise would not only lead to a practice contrary to the provisions of the statute, but would lead to confusion and disorder. It should not be sanctioned."

In our opinion the facts of the issue before us come well within the rule enunciated in Parker *et al. v.* Borough of Point Pleasant *et al.* and Home Fuel Oil Co. *v.* Borough of Glen Rock, and we so hold.

• • • The judgment of conviction is affirmed and the writ is dismissed with costs."

The Supreme Court was referring to R. S. 40:55-46, or N. J. S. A. 40:55-46, saying that appellants were guilty of laches in not reviewing the determination of the Board of

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Adjustment on August 1, 1946, within 30 days thereafter, which provides:

> "40:55-46. Certiorari; when allowed; effect.
>
> No writ of certiorari to review any decision of the board of adjustment shall issue unless application therefor be made within thirty days after the filing of the decision in the office of the board. The allowance of the writ shall not stay proceeding upon the decision appealed from unless so ordered by the court" (Source L. 1928, c. 274, sec. 9, p. 698).

The appellants were not obliged to review the determination of the Board of Adjustment of August 1, 1946, denying their so-called application for a year extension of authority to operate the slaughterhouse. This determination was not prejudicial error. On the contrary, the Board of Adjustment was without any authority or jurisdiction to grant appellants permission to operate the slaughterhouse for a year, or even a day. The zoning ordinance prohibited the slaughterhouse and it was enacted by the Township Committee, the governing body. The Board of Adjustment is without authority to make, amend, or supplement a township ordinance. This power is vested solely in the Township Committee. R. S. 40:55-30 and 40:55-31. The powers of the Board of Adjustment are enumerated in R. S. 40:55-39, which provides:

> "Powers of Board of Adjustment:
>
> The board of adjustment shall have power to:
>
> Hear appeals from administrative official. a. Hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any ordinance adopted or in force pursuant to this article.

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Hearings involving special exceptions. b. Hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass, but no such exception shall be made to grant or allow a structure or use in a district restricted against such structure or use unless the real estate in respect of which the exception is made abuts a district in which such structure or use is authorized by the zoning ordinance, and no such structure or use shall be allowed more than one hundred and fifty feet beyond the boundary line of the district in which such structure or use is authorized by the zoning ordinance;

Authorize variance from strict adherence to ordinance. c. Authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done, but no such variance shall be made to grant or allow a structure or use in a district restricted against such structure or use unless the real estate in respect of which the variance is made abuts a district in which such structure or use is authorized by the zoning ordinance, and no such structure or use shall be allowed more than one hundred and fifty feet beyond the boundary line of the district in which such structure or use is authorized by the zoning ordinance; and

Recommendations; approval by governing body. d. Recommend in writing to the governing board or board of public works upon appeal in specific cases that a structure or use be allowed in a district restricted against such structure or use where the real estate in respect of which such recommendation is made does not abut a district in which such structure or use is authorized by the zoning ordinance or where

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such real estate is more than one hundred and fifty feet beyond the boundary line of the district in which such structure or use is allowed by the zoning ordinance. Thereupon the governing body or board of public works may by resolution, approve or disapprove such recommendation. If such recommendation shall be approved by the governing body or board of public works then the administrative officer in charge of granting permits shall forthwith issue a permit for such structure or use" (Source L. 1928, c. 274, sec. 9, p. 698).

The foregoing constitutes all the powers and jurisdiction of a Board of Adjustment. How then could the Board of Adjustment on August 1, 1946, or at any other time, have granted to appellants a license, authority, or permission to operate their slaughterhouse for another year? Under R. S. 40:55-39, Subsection A, there was no order, requirement, etc., of any administrative official, and therefore no appeal. No license could be issued for a slaughterhouse anywhere in the Township as they were totally prohibited and no application for such a license or permit could possibly be made to any administrative official. Under R. S. 40:55-39, Subsections B and C, the Board of Adjustment can only grant or authorize a use in a district restricted against such a use when the district, where the property is, abuts a district where such use is authorized and then only if the real estate upon which such use is to be made is within 150 feet of the boundary line of a district where the use is allowed or authorized by the zoning ordinance. Since the zoning ordinance prohibited a slaughterhouse throughout the entire Township there was no district where such use was authorized much less being within 150 feet of the boundary line of a district where such use was authorized by the zoning ordinance. Appellants' applica-

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tion was for a permit to operate the slaughterhouse (S. C., p. 51), and not for a recommendation by the Board of Adjustment to the Township Committee, the governing body, for a variance in the zoning ordinance. Consequently, the application did not come within R. S. 40:55-39, Subsection D, as such applications are only made where the requested use is allowed in some district, not where it is totally prohibited. To permit the operation of the slaughterhouse, the zoning ordinance had to be amended by the Township Committee and it would be superfluous to request an amendment of the zoning ordinance by first applying to the Board of Adjustment because the Township Committee, the governing body, may amend the zoning ordinance without first getting a recommendation from the Board of Adjustment. See R. S. 40:55-34.

Appellants respectfully submit under this point that the Board of Adjustment on August 1, 1946, and at all other times, could not have granted appellants a permit to operate their slaughterhouse for another year, or even a day, and that their denial was legal and not reversible on appeal or review by certiorari. To succeed on a review, it would be necessary to show prejudicial error. No error was committed. The application for such a permit was beyond the power of the Board of Adjustment. To compel appellants to review the determination of the Board of Adjustment would be preposterous.

POINT 2.

The Board of Adjustment on August 1, 1946, and at all other times, was further without jurisdiction to act on appellants' application for a permit to operate their slaughterhouse as no 5 days' prior written notice of the time appointed for hearing thereon was given pursuant to R. S. 40:55-44.

In addition to the Board of Adjustment's lack of power to grant appellants a permit to operate their slaughterhouse for a year as advanced under Point 1 herein, the Board of Adjustment on August 1, 1946, and at all other times, was without power and jurisdiction to even act on the application because R. S. 40:55-44 provides as a jurisdictional prerequisite to the exercise of the power granted to the Board of Adjustment the giving of 5 days' prior written notice to all property owners within a radius of 200 feet of appellants' premises of the time appointed for hearing on the same, as follows:

> "R. S. 40:55-44. Appeals; time for hearing; notice; appearance by attorney.
>
> The board of adjustment shall fix a reasonable time for the hearing of the appeal, giving due notice thereof to the appellant. Said appellant shall at least five days prior to the time appointed for said hearing give personal notice to all property owners within two hundred feet of the property to be affected by said appeal. Such notice shall be given either by handing a copy thereof to the said property owners or by leaving a copy thereof at their usual place of abode, if said owners are the occupants of the property affected by such appeal or are residents of the municipality in which said property is located.

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> Whenever said owners are nonresidents of said municipality such notice may be given by sending written notice thereof by registered mail to the last known address of the property owner or owners, as shown by the most recent tax lists of said municipality. Where the owner is a partnership, service upon any partner as above provided, shall be sufficient, and where the owners are corporations, service upon any officer, as above set forth, shall be sufficient. The appellant shall by affidavit present satisfactory proof to the said board of adjustment at the time of the hearing that said notices have been duly served as aforesaid. Upon the hearing any party may appear in person or by agent or by attorney. (Source L. 1928, c. 274, sec. 9, p. 698.)"

Appellants could not have possibly complied with R. S. 40:55-44. Appellants had no intention to apply to the Board of Adjustment for a permit to operate their slaughterhouse until directed by the Board of Adjustment on July 30, 1946, to do so. The Board of Adjustment acted on the application on August 1, 1946. Certainly no property owner within a radius of 200 feet of appellants' premises could have received a 5 days prior written notice of the hearing thereon by the Board of Adjustment before July 30, 1946, when the hearing started, or August 1, 1946, when the Board of Adjustment denied the application. This notice has been consistently held by the State Courts to be a jurisdictional prerequisite.

In the case of *Hendley* v. *Ackerman*, 103 N. J. L. 305, 136 A. 733, the Supreme Court of New Jersey, in interpreting the foregoing statute, in an opinion delivered by Justice Campbell, stated:

> "It is admitted that no notice of any character was given by the board of adjustment of its meeting on July 15, 1926, and the return is barren of any

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showing that the board fixed July 15, 1926, as the time when it would hear the appeal. *The board of adjustment was therefore utterly without jurisdiction to hear and pass upon the appeal.*

In such a case statutes of limitation of the character sought to be invoked (the very same statute which these appellees in the case *sub judice* invoke) by the respondents are ineffective and cannot be used to curtail the power of review by this court".

In the case of *Schumacher* v. *Union City*, 9 N. J. Misc. 492, 154 A. 406, wherein the Supreme Court of New Jersey considered P. L. 1928, c. 274, now R. S. 40:55-44, stated:

"However, after the refusal of the building inspector to grant the permit (for a drive-in gasolene station), the present applicant, observing and in obedience to the requirements of the zoning statute, P. L. 1928, *supra*, and the zoning ordinance, appealed to the board of adjustment, and after hearing that body accepted an offer by the applicant to cede a part of his land to the city in order to ease up a situation respecting traffic conditions on Hudson Avenue and Forty-fifth Street and recommend that there should be a modification in the zoning ordinance respecting this particular plot which the city commissioners refused to accept.

Now this proceeding also seems to be without force because of two reasons:

1. The statute, P. L. 1928, c. 274, *supra* (now R. S. 40:55-44), requires notice to be given all property owners within two hundred feet of the lands sought to be relieved of the zoning restrictions before the board of adjustment has jurisdiction. *This was not done, and therefore that board did not have jurisdiction*".

The case of *Schumacher* v. *Union City, supra,* was approved by the Court of Errors and Appeals in *Somers* v.

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Borough of Bradley Beach, 115 N. J. L. 135, 178 A. 755. See also *Marvin* v. *Bd. of Adjustment, Westfield*, 137 A. 924, not officially reported.

Appellants respectfully submit under this point that the Board of Adjustment on August 1, 1946, and at all other times, was wholly without jurisdiction over the persons and proceedings to grant a permit to operate the slaughterhouse as the jurisdictional requisite of giving property owners within a 200 feet radius of appellants' premises a 5 days' prior written notice of the time and place of the hearing before the Board of Adjustment, as required by R. S. 40:55-44, was not given to anyone.

POINT 3.

The Board of Adjustment on August 1, 1946, and at all other times, was wholly without jurisdiction to entertain, consider, and determine the unconstitutionality of the zoning ordinance of the Township of Piscataway, or the invalidity of said zoning ordinance under the Constitution and Laws of New Jersey, and the proceeding before the Board of Adjustment was superfluous.

Appellants have always contended that the zoning ordinance of the Township of Piscataway, in so far as it prohibits the lawful business of slaughtering of animals throughout the entire Township of Piscataway, is unconstitutional because it violates the fourteenth amendment of the Constitution of the United States as this prohibition deprives appellants of their property without due process of law and denies to them the equal protection of law. When appellants appeared before the Board of Adjustment on July 30, 1946, they did so by order or direction of the Board of Adjustment to show cause why

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they were operating a slaughterhouse in the Township and had no intention prior thereto of applying for a permit to operate the slaughterhouse. It was only at the direction of the Board of Adjustment that the appellants applied for such a permit and then after they were at the meeting of the Board. This application by appellants for a permit to operate their slaughterhouse was as fruitless an undertaking as if they urged the issue that the zoning ordinance was unconstitutional since the Board of Adjustment was without power or jurisdiction to grant the permit or determine the constitutional question. How then could these appellants be precluded from attacking the constitutionality of the zoning ordinance in the Recorder's Court of the Township of Piscataway when charged formally with violations of said ordinance when the Board of Adjustment was without power to entertain and determine the constitutional question and therefore its denial of the application for a permit to operate the slaughterhouse could not be *res adjudicata* of the constitutional question, and the first jurisdictional forum to entertain such a constitutional issue was the said Recorder's Court? The courts of New Jersey have consistently and on numerous occasions held that a Board of Adjustment is totally without jurisdiction to entertain, hear, and determine constitutional and legal issues. Such questions are only determinable in the State courts; not by the Board of Adjustment.

All the powers of a Board of Adjustment are enumerated in R. S. 40:55-39, or N. J. S. A. 40:55-39. These enumerated powers do not include either expressly or impliedly the power to determine an issue involving the alleged unconstitutionality of a zoning ordinance. The failure of the State Legislature to include within the powers

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of a Board of Adjustment the authority to determine an attack upon the constitutionality of a zoning ordinance is reasonable and logical because it is not a requisite to membership on the Board of Adjustment that a member have some legal background. The provision regulating the appointment of members to the Board of Adjustment is R. S. 40:55-36, or N. J. S. A. 40:55-36, which provides:

> "40:55-36. Board of Adjustment; appointment, term and removal; vacancies.
>
> The governing body or board of public works shall provide for the appointment of a board of adjustment and in the regulations and restrictions adopted pursuant to the authority of this article shall provide that said board of adjustment may in appropriate cases and subject to appropriate conditions and safeguards make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.
>
> The board of adjustment shall consist of five members who shall not hold any elective office or position under the municipality, each to be appointed for such term as the governing body or board of public works may prescribe and be removable for cause by the governing body or board of public works upon written charges and after public hearing. The governing body or board of public works shall provide for the filling of vacancies resulting from the unexpired term of any member."

Appellants will show that not only is a Board of Adjustment without power or jurisdiction to entertain and determine an attack on the constitutionality of a zoning ordinance, or any other attack upon legal issues, but that where such constitutional or legal issues are urged against the validity of a zoning ordinance, the questions must first

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and exclusively be litigated in a court of law and it is superfluous to even proceed before a Board of Adjustment in the first instance.

In the case of *Losick* v. *Binda, et al.*, 102 N. J. L. 157, 130 A. 537, the Court of Errors and Appeals of New Jersey, in affirming the opinion of the Supreme Court in 3 N. J. Misc. 422, 128 A. 619, wherein the appellee obtained a writ of mandamus to compel the appellant, as building inspector of the Township of Weehawken, New Jersey, to issue a permit for the building of an apartment house of five stories to accommodate 26 families, which had been refused by the inspector because the zoning ordinance prohibited such a type of building in the zone where appellee's premises were located, and wherein the appellee did not prosecute an appeal to the Board of Adjustment from the building inspector's denial of the permit, stated:

> "It is also urged that the application to the Supreme Court was premature, since under Acts 1924, c. 146, sec. 7, a zoning board of appeals or, as denominated in the statute, a board of adjustment, was created for the purpose of dealing with properties peculiarly situated, with reference to the zoning requirements, and providing for equitable modifications in zoning regulations, where it is apparent unnecessary hardship would result to an owner, if the provisions of the ordinance were literally enforced. That was the situation presented in Allen *v.* Paterson, 98 N. J. L. 661, 121 A. 610, and affirmed in 123 A. 884, 99 N. J. L. 489, where upon certiorari the Supreme Court affirmed the proceedings of the board of adjustment, ordering certain modifications of the requirements of the zoning ordinance owing to the peculiar situation of a property owner, which required the modification in application of the strict and universal enforcement of the provisions of the ordinance.

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> The board of adjustment, as its title indicates, was created by the Act of 1924 solely for that purpose, and not to serve as an appellate body for the purpose of reviewing the legal and equitable character of the inspector's act in allowing or rejecting an application for a building permit.
>
> *The legal or constitutional questions involved in such procedure, are not a subject matter for the determination of that board, but must be presented for consideration as heretofore to the proper legal forum."*

In the case of *Slamowitz et al.* v. *Jelleme et al.*, 3 N. J. Misc. 1169, 130 A. 883, in answering the contention of the respondents that the relator was first obliged to prosecute an appeal to the Board of Adjustment from the building inspector's refusal to issue a building permit for an apartment house in a zone restricted against such use, stated:

> "That the relators did not exhaust their remedies by appeal. This point is wholly without merit. Upon the refusal by the building inspector relators made application to the board of commissioners, were referred to an adjustment board to be created, and to this board they applied, and were again refused. What more they could have done it is difficult to conceive. *The last step, however, they were not obliged to take. The constitutional rights of the relators were not triable before that body* (Losick v. Binda, 102 N. J. L. 157, 130 A. 537)".

In the case of *Vine* v. *Zabriskie et al.*, 122 N. J. L. 4, 3 A. (2d) 886, the Supreme Court in allowing a writ of mandamus to compel the issuance of a building permit where no appeal was taken to the Board of Adjustment from the building inspector's denial, stated:

> "The final point to be considered is whether the relator was not obliged to appeal from the decision

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of the Building Inspector to the Board of Adjustment before instituting this proceeding. We think not. *As the sole ground for refusing the permit was the pendency of the amendment of the ordinance of 1931 there was no question which could properly come before the Board of Adjustment which was within its power of function to pass upon and give relief.*"

See also *Builders' Realty Corp.* v. *Bigelow*, 102 N. J. L. 433, 131 A. 888, aff. 3 N. J. Misc. 540, 128 A. 887; *Steinberg* v. *Bigelow*, 3 N. J. Misc. 1231, 131 A. 114; *Herman & Co.* v. *Bd. of Adjustment of Newark*, 3 N. J. Misc. 1233, 131 A. 116; *H. Krumgold & Sons* v. *Jersey City*, 102 N. J. L. 170, 130 A. 635.

Appellants have no grievance with the determinations made in the cases of *Parker et al.* v. *Borough of Point Pleasant*, 11 N. J. Misc. 535, 167 A. 217, and *Home Fuel Oil Co.* v. *Borough of Glen Rock*, 118 N. J. L. 340, 192 A. 516, relied upon by the State Courts in dismissing appellants' writ of certiorari. These cases, in so far as the factual situation therein is expressed in the opinion, were subject matters within the jurisdiction of the Board of Adjustment in each instance. The opinions do not manifest that any constitutional attacks were made upon the validity of the zoning ordinances. In each instance there was involved the question of the use of land and apparently each case came within the powers of the Board of Adjustment and the exercise of the Board's power was proper. In the case *sub judice*, the sole issue has always been the unconstitutionality of the zoning ordinance in prohibiting throughout the entire Township the lawful business of slaughtering of animals for human consumption. This issue is not within the power of a Board of Adjustment to determine. Consequently the cases relied upon by the State Court are not in point. If these two cases relied upon by the State

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Court involved a question as to the constitutionality of the zoning ordinance in each instance, and this does not appear in the opinions, then the ruling in each case is erroneous and violative of the fourteenth amendment of the Constitution of the United States. However, the opinions in these two cases are barren of any constitutional question.

The appellants respectfully submit under this point that since the Board of Adjustment on August 1, 1946, and at all other times, was without power or jurisdiction to hear and determine the constitutional question of the invalidity of the zoning ordinance in so far as it prohibited the lawful business of slaughtering of animals throughout the entire Township, as being violative of the fourteenth amendment of the Constitution of the United States, its determination in denying appellants' application for a permit could not possibly be *res adjudicata* of the constitutional question and the State Courts' determination that it was constitutes a violation of the fourteenth amendment of the Constitution of the United States.

The constitutional issue in this case has been urged by appellants in all of the State Courts (S. C., pp. 36, 7, 72, and 101). The jurisdiction of the Board of Adjustment was persistently attacked in all State Courts and vehemently urged by appellants in their brief before the Court of Errors and Appeals of New Jersey, pages 11 to 30. Further the jurisdiction of any tribunal or court is always open to attack either directly or collaterally. A determination of a tribunal without jurisdiction is a nullity. Also the lack of jurisdiction can be urged at any time in a proceeding.

POINT 4.

R. S. 40:55-46, prescribing that a writ of certiorari must issue within 30 days after the filing of the decision in the office of the Board of Adjustment, is unconstitutional as being unreasonable, arbitrary, and not providing sufficient time to legally protect vested constitutional rights.

Appellants do not propose to labor this point too extensively because of the unquestioned lack of jurisdiction of the Board of Adjustment on August 1, 1946, and at all other times, and the fact that constitutional questions cannot be determined by a Board of Adjustment.

However, if this Court could possibly conclude that the Board of Adjustment had jurisdiction in this action over the parties and subject matter, then it is respectfully submitted that R. S. 40:55-46, is unconstitutional because it provides for a review within 30 days and not thereafter. These appellants had not even consulted an attorney in this case until some weeks after the 30 days period expired. The holding of the State Courts in this action in effect precludes these appellants from carrying on this lawful business in the Township of Piscataway and which right is guaranteed to appellants under the fourteenth amendment of the Constitution of the United States. Concededly, States have the power to enact statutes of limitation but the time period therein must be reasonable and not so short as to deny the constitutional rights of a person in effect. *Edwards* v. *Kearzey*, 96 U. S. 595; and *MacFarland* v. *Jackson*, 137 U. S. 258.

It is respectfully submitted that a 30 days period is most unreasonable to deprive a person of a constitutional right.

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Conclusion.

By reason of the foregoing, appellants respectfully submit that the Court of Errors and Appeals of New Jersey, now the Supreme Court of New Jersey, by refusing to entertain and determine the issue raised in this case by appellants that the Board of Adjustment on August 1, 1946, and at all other times, was without jurisdiction over the persons and subject matter and its denial of appellants' application for a permit could not be *res adjudicata* of the constitutional issue, and assuming that the Board of Adjustment had jurisdiction, constitutes an illusory, inadequate and unsubstantial non-Federal ground to support the judgment of said Court. Further, appellants respectfully submit that the judgment of the Court of Errors and Appeals of New Jersey in holding that appellants were precluded in the Recorder's Court from attacking the constitutionality of the zoning ordinance because appellants failed to review the determination of the Board of Adjustment within 30 days after August 1, 1946, when admittedly the Board of Adjustment was without jurisdiction to entertain and determine the issue as to the unconstitutionality of the zoning ordinance, in itself is violative of the fourteenth amendment of the Constitution of the United States. By reason thereof, appellants respectfully submit that this Court should retain jurisdiction of this appeal.

Respectfully submitted,

Edward J. Santoro,
Attorney for Appellants,

John T. Keefe,
Of Counsel with Appellants.

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